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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 554

JULIUS ARONOFF,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITIONER'S REPLY BRIEF

CHARLES V. HALLEY, JR.,
Attorney for Petitioner.

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Argument

A

The United States in its brief in opposition to the present application for a writ of certiorari has, to a considerable extent, abandoned its original efforts to substantiate the petitioner's conviction on the basis of the transfers of merchandise from B. Glass Inc., in Suffern, N. Y., to the premises of Bergen Furniture Factories, Inc., in Brooklyn, and now seeks to support the conviction on the basis of some incidental transfer or transfers of merchandise shown to have been made from the premises of Famous Furniture Co. in Brooklyn, to the Bergen Furniture Factories, Inc.

Petitioner did not discuss these last mentioned transfers in his original brief for the reason as was pointed out by him, the record did not show his participation therein or

knowledge thereof. Mention is again made of these transfers from Famous to Bergen for the reason that the United States in its opposing brief, pursues the argument that petitioner participated in these transfers and that consequently his conviction should be affirmed on the basis of them alone.

In substantiation of this line of reasoning, the United States at page 7 of its brief in opposition, and again at pages 10 and 13, refers to various pages of the record as containing testimony showing petitioner's implication in the direct transfers of merchandise from the Famous to the Bergen. Counsel for the petitioner have carefully examined the pages of the record referred to and respectfully submit to the Court that they do not substantiate the Government's interpretation of the record, and that on the contrary, they wholly fail to show the petitioner's participation in these latter transfers.

In the circumstances, if petitioner's conviction is to be upheld at all, it must be held upon the Government's original theory that the so-called Suffern transfers and the petitioner's participation therein established his guilt of the crimes alleged in the indictment.

B

With respect to the Suffern transfers, the brief of the United States in opposition, will serve only to bear out petitioner's original contention that there were a number of issues raised by the evidence, each of which was required to be clearly framed and submitted to the jury for its determination before it could be said that petitioner had been accorded a full trial of the charges leveled against him. Thus on the issue of whether or not the merchandise in question in fact belonged to the Famous Furniture Co., at the time of its removal from the premises of B. Glass Inc., the Government at pages 11 and 12 of its brief, clearly recognizes that this question presented a substantial

issue for the jury's determination, and that had the jury found that title had in fact passed to B. Glass Inc., the finding would have required a dismissal of the charges against petitioner.

Again, at pages 12, 13 and 14 of its brief, the Government clearly recognizes the existence of the additional issues pointed out by petitioner in his main brief, namely, whether or not, assuming title did remain in the Famous Furniture Co. after the delivery of the merchandise to Suffern, Famous continued to have any title or equity in it after the loan from Majestic Factors Corporation; and whether or not the petitioner in fact had any knowledge of Famous Furniture Company's interest in the furniture in the Suffern store at any time, or of Famous' precarious financial condition.

All of these issues ought to have been properly framed and submitted to the jury by the Trial Court, and it is repeated that the failure of the Trial Court to do this, was a very real and serious deprivation of the petitioner's right to have the issues raised by the charges made against him, fully considered and determined by a jury of his peers.

The Government's present argument that the Trial Judge's procedure in submitting to the jury only the question of whether or not petitioner participated in the transaction shown by the evidence, was not prejudicial to petitioner because the Court had previously read to the jury the Statutes upon which the indictment was based, and explained in a general way the meaning and application of those Statutes, is untenable.

Clearly a mere general reference to the Statutes and the indictment is not in any sense a framing of the issues for the jury, and cannot cure a failure to frame and submit the issues fully and properly. This is particularly true and particularly prejudicial where, as in the present case, the Trial Judge does in fact clearly frame one of the several issues involved, and in so doing, implied to the jury that the issue so framed is the sole question presented by the entire evidence for its determination.

The gravity of the Trial Judge's omission in this regard is indeed heightened by the form of the jury's ultimate verdict, which the jurors accompanied with a plea of leniency for petitioner (R. 165).

It is not an unreasonable conclusion that the jurors' plea of leniency resulted from the fact that they found there was something in the case favoring the petitioner, but felt constrained to return a verdict of guilt because of the limitation imposed upon them by the Court's charge to the effect that petitioner's participation or lack of participation in the transactions, was the sole question for their consideration, and because, in consequence, they did not feel free to consider any other question in arriving at their verdict.

It is the Government's contention, however, that regardless of how prejudicial these omissions in the Trial Judge's charge may have been to petitioner, he is, nevertheless, forever foreclosed of his right to a full trial of the issues because petitioner's assigned counsel upon the trial omitted to take exception to the charge. In support of this claim, the Government cites *Cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-239; *Holmgren* v. *United States*, 217 U. S. 509, 523, 524; *Allis* v. *United States*, 155 U. S. 117, 122, none of which support the Government's argument in this respect.

A reading of the cases cited will show that each of them revolved about some distinct point and contrary to supporting the Government's position, they in fact affirm the principle forwarded in petitioner's main brief. That "Appellate Courts in the public interest may of their own motion, notice errors to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings". (*United States* v. *Atkinson*, 297 U. S. 13, 157, 160; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.)

Conclusion

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

CHARLES V. HALLEY, JR.,
Attorney for Petitioner.